NO. 83-958

In The
Supreme Court of the United States
October Term, 1983

PORT OF TACOMA,
Petitioner,

vs.

PUYALLUP INDIAN TRIBE,
Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE PUYALLUP INDIAN TRIBE IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district and circuit courts correctly determine from the evidence presented that the United States and the Puyallup Indians intended to include the Puyallup River and its bed as part of the Puyallup Indian Reservation?

2. Did the Puyallup Tribe retain its title to riverbed land which was exposed by an artificial river channelization project?

PARTIES

The Puyallup Indian Tribe and the Port of Tacoma are the only parties to this case.

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OPINIONS BELOW

The district court's opinion, findings of fact, and conclusions of law are reported at 525 F.Supp. 65 (W.D. Wash. 1981). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 717 F.2d 1251 (1983).

STATEMENT OF THE CASE

The Puyallup Indian Tribe and the Port of Tacoma here dispute title to 12½ acres of undeveloped land on the Puyallup Indian Reservation. The parcel was part of the bed of the Puyallup River immediately prior to a United States Army Corps of Engineers channelization project. Relocation of the river left the parcel as dry land outside the river channel.

The district court considered the stipulations made by the parties, examined more than 50 exhibits, considered the testimony of the expert witnesses, then made detailed findings of fact. 525 F.Supp. 65, 70-74. Applying the legal standards established by this Court in *Montana v. United States,* 450 U.S. 544 (1981), the district court[1] ruled that (1) both the United States and the Puyallup Indians intended to include the Puyallup River and its bed as part of the Reservation when it was enlarged by Executive Order and (2) under Washington law the channelization project did not disturb the Tribe's title to the former riverbed land. On the Port's appeal, the Ninth Circuit thoroughly reviewed the facts and legal standards and affirmed the district court's "well-considered determination" of both issues. 717 F.2d at 1264.

1. The Evidence Concerning Reservation Of The Riverbed

Petitioner's Statement of the Case ignores most of the evidence presented at trial, and the findings of fact based on that evidence, which addressed the key issue in the case: the intent of the United States and the Indians to include the bed of the Puyallup River as part of the

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[1] Which had jurisdiction under 28 U.S.C. 1362.

Puyallup Reservation when the Reservation was expanded in 1857. The evidence and findings show that the Puyallup River was at treaty times, as it is now, the center of the lives of the Puyallup Indians. Salmon, steelhead, and shellfish formed the bulk of the Puyallups' diet. The Indians also traded fresh and dried fish with settlers in the area and in distant regions. Fish and fishing activities were at the heart of their spiritual beliefs and social customs. (525 F.Supp. at 71, Findings 5-7). See also *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664-666 (1979).

Puyallup Indians not only fished from the banks of the river and from boats, they also harvested fish from traps and weirs which entailed use of the riverbed itself. These substantial structures consisted of a series of wooden tripods lashed together which were firmly planted in the bed of the river. They spanned the river from bank to bank in a variety of locations. (Finding 7.)

The river and its bed were important to the Indians for other reasons as well. Villages were located for the most part on the rivers and their tributaries. The Indians took their personal names and the names for their villages from the river and tributaries on which they lived. Their concepts of territory, boundaries, and political unity were based on the rivers. Thus, Puyallup Indians conceived of their territory as the Puyallup River and the land for a certain distance on either side of it. Religious practices involved the river and its bed. (Findings 5 and 6.)

When Territorial Governor Isaac Stevens and other federal representatives negotiated the Treaty of Medicine Creek in 1854 (10 Stat. 1132; Pet. App. A-1 through A-5),

they knew that fishing was the most important part of the Indians' lives and the Puyallup River the center of the Puyallups' territory. When the boundaries of the Reservation were later marked out in an area that removed the Puyallup Indians from the Puyallup River, the Indians felt betrayed and went to war to protest. A number of settlers and Indians were killed. (525 F.Supp. at 72; Findings 9-11.)

Governor Stevens therefore met with the Indians at Fox Island in 1856 to correct the wrongs and make peace. The minutes of the Fox Island Council, an exhibit before the district court, show that the parties discussed modification of the Puyallup Reservation in detail. Both sides focused their attention on the importance of the Puyallup River to the Indians. Stevens, for example, said that he wanted to end the hostilities, to avoid future hostilities, and, after explicitly referring to the river, that "the Great Father" would modify the Reservation so as to satisfy the Indians. The Indians who spoke emphasized the importance of the river. Ultimately, Stevens recommended moving and enlarging the Puyallup Reservation so as to include the mouth and lower portion of the Puyallup River to satisfy the Indians. Department of the Interior officials recommended that the President adopt the agreement reached at Fox Island based on Governor Stevens' recommendations and the "Indians' assent." (Pet. App. A-7.) The President adopted that recommendation by Executive Order of January 20, 1857, I Kappler 920 (Pet. A-8), expanding the Reservation pursuant to Article 6 of the Treaty so as to include the body of land through which flowed the lower portion of the Puyallup River including the property involved in this case. In short, the expanded Reservation was located explicitly because of the presence

of the Puyallup River. (525 F.Supp. at 72-73, Findings 12-16.)

One of the Tribe's expert witnesses, anthropologist Dr. Barbara Lane, discussed the importance of the river to the Indians, the uses they made of the river and its bed, and the negotiations leading to the expansion of the Reservation.[2] Dr. Lane testified that in her opinion it was the intent of both the federal representatives and the Indians to include the river and its bed as part of the Reservation. She based that conclusion on the explicit discussion of the river at the Fox Island Council, the importance of the river to the Indians, the federal representatives' awareness of that importance, their selection of the reservation based on the location of the river, the correspondence from Department of the Interior officials, and corroboration found in later correspondence among federal officials and others. (Finding 15.)

The Port of Tacoma offered no documents or testimony whatsoever to dispute the Tribe's evidence concerning the history of the Puyallup Indians, the uses and importance of the river, or the intent of the parties. 717 F. 2d at 1260, n. 8.

2. The Change In The River's Course

The Puyallup River in its natural state meandered through the Puyallup River Valley, constantly changing its course by gradual erosion of the river banks. In the

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[2] Dr. Lane is one of the foremost authorities on Indians in the Pacific Northwest. The district judge in the leading fishing rights case in the Northwest noted her expertise, *United States v. Washington*, 384 F.Supp. 312, 350 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *later substantially aff'd sub nom Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1977), and the Ninth Circuit here agreed. 717 F.2d at 1260, n. 8.

late 1940's the United States Army Corps of Engineers relocated the lower portion of the river in a relatively straight artificial channel. The property disputed in this case was a portion of the riverbed immediately before that channelization project but became dry land outside the channel as a result of the project. In the condemnation action which the United States had instituted to obtain land for the channelization project, it was recognized that former riverbed land was owned by the United States in trust for the Puyallup Indian Tribe. The Port of Tacoma nevertheless claimed title to the newly exposed land based on its status as record owner of the land adjacent to this property. The only use which the Port has made of the land, however, has been occasional leases of the property to third parties for storage of wood chips, firewood, and the like. (525 F.Supp. at 73-74, Findings 4, 18-23; Pet. 3).

REASONS FOR DENYING THE WRIT

The decision below correctly applies the rules reiterated by this Court in *Montana v. United States*, 450 U.S. 544 (1981), for determining ownership of land underlying navigable waters on Indian reservations. The judgment of the court of appeals does not conflict with any decision of this Court, of another court of appeals, or of a state court of last resort. Although similar cases may arise on some other reservations, the legal principles which the courts apply are not in dispute.[3] This Court indicated in *Montana*

[3] Although the Puyallup Tribe disagrees with some of those principles, it did not raise those disputes here, showing instead that it is entitled to the property even under the *Montana* standards.

(450 U.S. at 556) and petitioner concedes (Pet. 6) that each case is determined by its particular historical circumstances and the actions and statements of the parties. Petitioner here, after failing in two courts below, merely seeks a third opportunity to convince someone that the local facts of this case support its position. Review by this Court is not designed for that kind of repetitive examination of the facts.

1. The Decision Below Is Consistent With This Court's Decision In United States v. Montana

Contrary to petitioner's argument (Pet. 4-8), the decision below does not conflict with *Montana*. In order to overcome the strong presumption against conveyance, a tribe must show a public exigency justifying the conveyance and must show that the parties' intent to include the bed "was definitely declared or otherwise made plain . . ." 450 U.S. at 552. The courts below scrupulously observed and applied those rules, determining only after a careful review of the evidence that this case overwhelmingly demonstrates the existence of facts which this Court has deemed sufficient to support a finding that a riverbed was included as part of the reservation.

In *Montana*, this Court gave *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), as an example of a set of facts which demonstrated the requisite intent to include land underlying navigable water 600 feet from the high tide line, even though the granting language referred only to "the body of *lands* known as Annette islands", 248 U.S. at 86 (emphasis added). 450 U.S. at 556. The creation and expansion of the Puyallup Reservation included all of the factors which were collectively deemed sufficient to show the required intent in *Alaska Pacific Fisheries:* the United States encouraged the Indians to

locate on the land; the Indians could not support themselves from the uplands alone; the Indians depended on fish to support themselves; the Indians both sold and consumed salmon; the purpose of the reservation was to set aside an area where the Indians could support themselves through fishing; the Indians naturally looked upon the fishing grounds as part of the reservation. 248 U.S. at 88-90. Moreover, our case has two additional factors demonstrating the required intent which were not present in *Alaska Pacific Fisheries:* explicit discussion by the negotiators of the importance of the river, and an additional public exigency — the desire to avoid further warfare with the Indians. In short, since this Court considers *Alaska Pacific Fisheries* to be a sufficient showing of the intent to include land underlying navigable water as part of a reservation, this case *a fortiori* demonstrates the required intent.

Far from conflicting with *Montana* then, this case fits comfortably into its teaching. Contrary to the Port's suggestion (Pet. 5), the Ninth Circuit in this case did not depart from the burden of proof required by *Montana* when it observed that treaties must be interpreted as the Indians would have understood them. 717 F.2d at 1257. First, that rule of interpretation is not inconsistent with *Montana:* it was applied by this Court in *Alaska Pacific Fisheries,* 248 U.S. at 89, the case cited with approval in *Montana.* More important, however, that rule did not determine the outcome here. The Ninth Circuit's mention of the rule, and of *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), appears only in a preliminary discussion of general legal principles. 717 F.2d at 1257. When it turned to the facts of this case, *Id.* at 1259-1261, the circuit opinion emphasized, as this Court required, the strong presump-

tion against conveyance (717 F.2d at 1257, quoting from *Montana*, 450 U.S. at 552), and that "the mere fact that the bed of a navigable water lies within the boundaries [of an Indian reservation] does not make the riverbed part of the conveyed land . . ." (717 F.2d at 1257, quoting from *Montana*, 450 U.S. at 554). Both courts below applied that very demanding burden of proof and ruled in favor of the Tribe only after finding that the detailed evidence "made very plain" the intention to convey the riverbed and that there was a public exigency justifying its inclusion. 717 F.2d at 1260. In short, the rule for interpreting treaties was neither necessary to nor the determining factor in the decision below.

Petitioner speculates that the Unites States would not have intended to include the riverbed because treaty language adequately protected the Tribe's fishing rights. Apart from the inadequacy of the fishing rights clauses to provide all of the legal protection which ownership provides, petitioner produced no evidence whatsoever, nor does any exist, that the federal representatives intended to exclude the bed for that reason, or in fact that they even thought of the two concepts as related. The Tribe, by contrast, adduced a wealth of evidence that the United States *did* intend to include the bed, for both fishing and non-fishing related reasons. It would be a cruel trick to assume without any supporting evidence, as petitioner asks us to do, that treaty language designed to *protect* the Indians sub silentio overruled the extensive evidence of intent to include the bed. That result would be particularly illogical here where the Tribe was more vitally concerned about its river than perhaps any other tribe with which the United States dealt. In any case, all of these matters which reflect on the parties' intent were fully

considered by both courts below and do not merit reexamination here.[4]

2. The Facts Were Thoroughly Examined By The Two Courts Below And Do Not Warrant Further Review

Since determination of the parties' intent, the key issue in this case, is a factual question, *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978), certiorari here is even less appropriate in light of "this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967) (citation omitted). The two-court rule has been applied in a wide variety of circumstances, including cases such as this one where the primary factual issue was the intent of one or more parties. *Rogers v. Lodge*, — U.S. —, 102 S.Ct. 3272 (1982). Petitioner has suggested no such compelling reason for abandoning this Court's policy.

3. There Is No Conflict With Any Other Court of Appeals Decision

The decision below is consistent with the pattern of cases decided by the lower courts since *Montana*. The de-

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[4] Petitioner's reference to this Court's discussion in *Montana* of "virtually identical" language in the Crow and Puyallup treaties (Pet. 5) is irrelevant here. First, this Court observed that that similarity was relevant to the jurisdictional issue involved in *Montana*, not the ownership issue. 450 U.S. at 560-561. Second, in this case the Puyallup Tribe does not rely on treaty language to demonstrate riverbed ownership; it relies on the negotiations leading to the subsequent executive order and the vast array of other evidence produced at trial. 717 F.2d at 1260, n. 9.

cisions have applied the rules announced by this Court to a variety of factual settings. In those cases where the requisite showing of intent has been made, the courts have ruled in favor of the tribes. *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 314 (1982); *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3536 (1983); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F.2d 455 (9th Cir. 1983) *(petition for cert. pending)*. Where that intent has not been adequately demonstrated, the rulings have gone against the tribes. *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 423 (1983); *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), *cert. denied*, — U.S. —, 103 S.Ct. 3537 (1983).[5]

The decision below does not conflict with *United States v. Aranson, supra*, (Pet. 7), and even if there were such a conflict, *Supreme Court* Rule 17.1(a) would not counsel a grant of certiorari because the decisions come from the same circuit. *Aranson* and this case together indeed demonstrate the Ninth Circuit's adherence to the standards set forth in *Montana* rather than any conflict. The tribe involved in *Aranson* was simply not "so dependent on the river that Congress would have intended to . . . convey the river bed." 696 F.2d at 666. The *Aranson* panel noted, however, that under facts paralleling those of *Alaska Pacific Fisheries*, a tribe can prevail in its claim of ownership and cited the district court's opinon

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[5] The decision below does not conflict with *Baker*, which emphasized (1) that the reservation was created *after* Wisconsin became a state and (2) that there was nothing in the record to show the requisite intent. 698 F.2d at 1335. The history of the Puyallup Indians and Reservation are entirely the opposite in both respects.

in this case as an example. *Id.* at 665-666. The Court of Appeals in this case in turn cited *Aranson* with approval. 717 F.2d at 1261. There is thus no conflict between the decisions.

4. There Is No Conflict With Any Ruling Of the Washington Supreme Court Nor Any State Law Issue Justifying Certification

Petitioner argues that under Washington law the land exposed by an artificial rechannelization project "accretes to the adjoining uplands", relying on one state court of appeals case, *Strom v. Sheldon*, 527 P.2d 1382 (Div. 2 1974) (Pet. 9). The Ninth Circuit correctly held that the state court of appeals decision dealt with a different factual situation and a different legal principle than our case presents. 717 F.2d at 1262-1263. The Washington Supreme Court has consistently held that a government rechannelization project constitutes avulsion which does not change property boundaries. *Ghione v. Washington*, 175 P.2d 955 (1946); *Hill v. Newell*, 149 P. 951 (1915). The state court of appeals could not and did not purport to overrule those state supreme court decisions and create a "radical abandonment of well-settled principles governing real estate boundaries." 717 F.2d at 1263.

5. Petitioner's Remaining Arguments Are Incorrect And Do Not Merit Review

Argument number 2 (Pet. 9) fails for several reasons. First, the Puyallup Reservation is a treaty reservation. Treaty of Medicine Creek, Article 2. (Pet. App. A-2.) The Executive Order which expanded the Reservation to add the river and its bed was issued pursuant to Article 6 of the Treaty. (Pet. App. A-3.) Moreover, even if it were considered an executive order reservation, the

Tribe's title vis-a-vis the petitioner would be just as effective as a treaty or statutorily-created reservation, *Donnelly v. United States,* 228 U.S. 243, 256 (1913); *Cohen's Handbook of Federal Indian Law* (1982 Ed.), p. 493, which is in turn "as sacred and securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe,* 304 U.S. 111, 117 (1938). The cases upon which petitioner relies (*Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949) and *Sioux Tribe v. United States,* 316 U.S. 317 (1942)) limit only the right of compensation when the United States rescinds the grant of a reservation. No such rescission or claim for compensation is involved here, and even if one were, it would have no bearing on the issue the petitioner contests: whether the executive order conveyed title in 1857.

Neither does petitioner's reference (Pet. 8) to *Puyallup Tribe v. Washington Department of Game,* 433 U.S. 165 (1977) *("Puyallup III")* merit this Court's review. As the Ninth Circuit noted, the language of that decision demonstrated this Court's awareness that riverbed ownership was not an issue and was not decided. 717 F.2d at 1261, n. 10. Further, it was not an issue at any other stage of that litigation, either in this Court or in the state courts. The "uncontradicted findings" mentioned in footnote 12, 433 U.S. at 174, referred to the state court decision in *Puyallup I* which likewise never addressed the issue of riverbed ownership 422 P.2d 754, 759 (Wash. S.Ct. 1967). The state court was discussing, in the referenced passage, land sales made by allottees who, as a matter of law, *Montana, supra,* 450 U.S. at 551; *Shively v. Bowlby,* 152 U.S. 1, 48 (1894), as well as under the facts of this Reservation, did not have the riverbed as part of their allotments

and therefore could not have sold it. Moreover, petitioner conceded in the district court that allotments on the Reservation did not include the riverbed (which of course means that any sale of an allotment did not include the bed) and that neither the Tribe nor the United States has ever conveyed the riverbed. 525 F.Supp. at 76, Conclusion of Law 16; Pre-Trial Order, Uncontested Facts 29 and 30.[6]

As the Ninth Circuit noted, the courts have already disposed of petitioner's argument that the Puyallup Tribe was created following the Indian Reorganization Act. (Pet. 9.) 717 F.2d at 1261, n. 10. In addition, the Tribe could easily have presented the factual material which would have verified once again that it has continuously existed since the Reservation was created. We had no idea that that would be necessary, however, because the Port did not raise the argument as a "Disputed Fact," "Issue of Fact," or "Issue of Law" in the pre-trial order.

Argument number 5 (Pet. 10) makes no attempt to refute the Ninth Circuit's careful analysis which concluded that joinder of the State of Washington was not required by F.R.C.P. 19. 717 F. 2d at 1254-1256. It is not

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[6] 29. . . . . There is nothing to indicate that either the United States or the Tribe intended to include the bed in any allotments. . . . .

30. With the possible exception of the State of Washington's admission to the Union, the effect of which the parties dispute, no other federal or tribal action prior to the Corps channelization project described below purported or attempted to convey any interest in that portion of the bed of the river in the vicinity of the property involved in this case.

Pre-Trial Order, page 12.

clear why petitioner seeks that joinder since it would only gain another adversary. In any case, petitioner does not suggest, even if its argument were correct, why certiorari would be appropriate.

CONCLUSION

The decision of the two courts below is a factual determination based on the legal standards promulgated by this Court in *Montana* and *Alaska Pacific Fisheries*. The petition for writ of certiorari should be denied.

Respectfully submitted,

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January, 1984